Supreme Court of the United States.

OCTOBER TERM, 1897.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ALEXANDER REEDER.

No. 208.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff, Alexander Reeder, a resident citizen of the State of Kansas, brought this action against The Texas and Pacific Railway Company, a corporation under the laws of the United States, in the District Court of Marion County, Texas.

It was removed to the Circuit Court of the United States for the Eastern District of Texas, defendant being a Federal corporation.

Plaintiff alleged that on October 22, 1894, he was transporting certain horses and cows from Scottsville, Kansas, to Houston, Texas, and that while on the line

of the defendant company between Texarkana and Longview, Texas, he being in the same car with his horses and cows, defendant's servants negligently and recklessly and against his protest jolted and jerked the train, causing his stock to fall down and that while he was engaged in getting them on their feet, he was injured by a jolt or jar of the train "caused by the engineer in charge of said train starting or stopping or moving the same or a portion thereof with unnecessary abruptness and violence." He further alleged that he was "riding in said car on a drover's pass with the knowledge, acquiescence and consent of the defendant" (Tr., pp. 2, 3).

Defendant demurred generally, pleaded the general issue, and for special answer alleged the contributory negligence of plaintiff in riding in the stock car instead of the caboose provided for his use and in trying to lift his stock to their feet while the train was in rapid motion. Defendant also alleged that the injury complained of was one of the assumed risks "incident to the nature of his contract and the mode of his transportation and that by the rules of the company the plaintiff with his drover's pass was entitled to, and required to ride in the caboose provided for him; that he was advised and notified of said rules and refused to ride in the caboose of his own choice and over the protest of defendant, that the stock car was more dangerous to be in than the caboose, and that if he had been in the caboose instead of in the stock car he would not have been hurt" (Tr., pp. 7, 8).

Plaintiff demurred to the answer, and put in issue the new matter set up in it.

At the trial, the "Live-Stock contract," under which plaintiff was traveling and transporting his stock, was

put in evidence. It contained a clause as follows (Tr., p. 22):

"NINTH. That the person or persons in charge of live stock covered by this contract *shall remain in the caboose car attached to the train while the same is in motion*, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever, and that the said first party shall not be required to stop or start its train or caboose cars from depots or platforms, or to furnish lights for the accommodation or safety of such persons."

Another clause of said contract signed by plaintiff recited (Tr., p. 23):

"We hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, *we shall be deemed employees of said company*, for the purposes in said contract stated, and that we do agree to assume, and do *hereby assume all risk incident to such employment*, and that said company shall, in no case, be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employees."

Plaintiff *in his deposition* testified (Tr., p. 11) that he "rode in the car to look after the stock and to feed and water them and see that none of them got down in the car so that they could not get up or get hurt by others trampling on them while down," that the train employees knew he was in the stock car no one objecting. He described the accident thus (Tr., pp. 11, 12):

"I was injured a short distance from Longview, at about 5 o'clock p. m. on the 25th day of October, 1894; there is a steep grade near Longview, and the train stalled and the engineer, in trying to get headway, would back the train a short distance and then start up with a terrible jerk as he took up the slack of the

train ; my car was next to the caboose and received the full force of the jerk and threw several of my cows down and the horses on top of them ; the jar broke the halters that held horses ; I saw they were being killed by the repeated jerks and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car ; while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time ; I then managed to get the stock all up, and was still holding on to the side of the car and up in the feed-trough, when the engine came back against the train, without my knowing that it was coming, with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed. The car jerked my arm out of place in the shoulder joint. Soon afterwards I called the conductor and he came to my assistance," &c. * * *

" The engine came back against the car with great force and then plunged forward, taking up the slack, and jerked the car I was in with such force as to hurt me as already stated. I was up in the feed-trough, and was just going to get down, when the jerk came, and was entirely unexpected to me. The jolt was worst I had experienced, and many others after leaving Texarkana were severe enough to throw the stock off their feet and kept me busy in getting them up. The stock had been thrown down by previous jerks in trying to get up the grade, and I had just gotten them on their feet again when I was hurt ; the halters of the horses were broken and the horses were thrown on the cattle, and unless they were all gotten up and in place they would be killed or greatly injured ; I was holding on to some iron on the side of the car, and the great jerk pulled my right arm out of socket."

When *on the stand* he testified (Tr., p. 16) :

" Just before I was injured the jar knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again and after I got them up I was going back to take the seat again, and when I got about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and

after they got started on the run, and then I got down and got on my feet again; as soon as they stopped again I called to the conductor and brakeman."

On cross-examination (Tr. p. 17):

"I had a good seat in the corner of the car, and I sat on it when I wanted to. I was in the trough when I got hurt."

Defendant's witnesses, the conductor, engineer and two brakemen of the train, testified that they did not "double" (*i. e.*, separate the train and take one section at a time up the grade) on the day plaintiff was hurt between Marshall and Longview, but did "double" east of Marshall and that the trip was of the usual character and without unusual incident.

Both the conductor and the brakeman said they had warned plaintiff that the caboose was a safer place for him to be in than was the stock car, and requested him to ride in the caboose (Tr., pp. 18 20). To the conductor's request plaintiff replied (Tr., p. 18) that "it was inconvenient for him to get in and out of the car to attend to his stock, and he would rather ride in the car with his stock." His answer to the brakeman was (Tr., p. 19) that he "would rather ride in his car with the stock."

Defendant's witnesses also testified that *plaintiff would not have been hurt had he been in the caboose* (Tr., pp. 18, 20).

There was a verdict and judgment for plaintiff in the sum of $1,500. The judgment was reviewed and affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, and from the judgment of the latter Court a writ of error has been prosecuted to this Court.

Assignment of Errors.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error which is as follows:

"Upon the law and the facts in this case the plaintiff cannot recover, and you are instructed to return a verdict for the defendant,"

because the plaintiff assumed the risk and by riding in the stock car instead of the caboose, which he was invited to ride in and which was prepared for his transportation and in which he would not have been hurt, was guilty of contributory negligence, and upon all the evidence he was not entitled to recover.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said court committed no error in that portion of its main charge which is as follows:

"If you believe from the evidence that the plaintiff Alexander Reeder was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was

stationary, his cattle being down and needed his attention, he, at that time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the car in which he was riding through and by the negligence of the defendant company or its operatives, you will find for plaintiff,"

because it was not qualified by the doctrine of assumed risk and contributory negligence of the plaintiff in riding in the stock car instead of the caboose, which was a safer position and where he would not have been hurt.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court of the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error which is as follows :

"If you find from the evidence that the plaintiff would not have been hurt if he had rode in the caboose instead of the stock car, you will find for the defendant,"

because the caboose was the proper car for the plaintiff to ride in, and where he was invited to ride by the operatives of the defendant, and where his drover's pass required him to ride, and where he would not have been hurt if he had done so.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you find from the evidence that the plaintiff, Alexander Reeder, rode in the stock car with his cattle and goods, and that a caboose was attached to said train, and the conductor or operatives of said train invited the plaintiff to ride in said caboose, and that the caboose was a safer place to ride in than the stock car, you will find for the defendant company."

because, if the plaintiff voluntarily or for his own convenience rode in the stock car when a caboose was provided for him, he thereby contributed to his own injury, and assumed all risk in taking the more dangerous position in the stock car, which was proved by the uncontroverted evidence in the case.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to give special charge asked by plaintiff in error, which is as follows:

"If you find from the evidence that the caboose was a safer place to ride in than the stock car and the plaintiff knew it, or could have known it by the use of ordinary diligence, the plaintiff cannot recover, and you will find for defendant company,"

because it was established by the undisputed evidence that the caboose was a safer place, and the plaintiff was requested by the operatives to ride in the caboose, and he was guilty of contributory negligence by riding in the stock car.

ARGUMENT.

I.

Upon the undisputed facts of this case the trial Court erred in not directing a verdict for the defendant.

In *Union Pacific Railway Co. vs. McDonald*, 152 U. S., 262, 283, Mr. Justice HARLAN, following a long line of decisions, thus tersely stated the rule in such cases:

"Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it (Delaware, Lackawanna, &c., Railroad vs. Converse, 139 U. S., 469, 472, and authorities there cited: Elliott vs. Chicago, Milwaukee & St. Paul Railway, 150 U. S., 245; Anderson County Commissioners vs. Beal, 113 U. S., 227, 241)."

Mr. Justice WHITE, in *Southern Pacific Co. vs. Pool*, 160 U. S., 438, 440, quoted the above extract as a correct statement of the law, preceding it with the remark:

"There is also no doubt when the facts are undisputed or clearly preponderant that the question of negligence is one of law."

Cases in which the rule has been approved or applied are:

Griggs vs. Houston, 104 U. S., 553.
Randall vs. Baltimore & Ohio Ry. Co., 109 U. S., 478.
Goodlett vs. Louisville & Nashville Rd., 122 U. S., 391.

Delaware, &c., R. Co. vs. Converse, 139 U. S., 469.
Grand Trunk, &c., vs. Ives, 144 U. S., 408, 417.
Washington & Georgetown Rd. vs. Harmon, 147 U. S., 571, 580.
Richmond & Danville Rd. vs. Powers, 149 U. S., 43, 45.
Elliott vs. Chicago & Milwaukee Ry., 150 U. S., 245, 246.

Mr. Justice LAMAR, discussing the terms "ordinary care," "reasonable prudence" and the like, said, in *Grand Trunk Ry. Co. vs. Ives*, 144 U. S., 408, 417:

"It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court" (citing cases).

And this was repeated in *Texas & Pacific Co. vs. Gentry*, 163 U. S., 353, Mr. Justice HARLAN rendering the opinion.

In view of the law as thus announced, it becomes necessary to examine the record and determine therefrom whether or not the trial Court should have granted defendants' request for the direction of a verdict in its favor.

The question is presented by the second assignment of error.

We sincerely believe, and confidently claim, such an examination will show that the facts were "undisputed, and of such a conclusive character," that "reasonable men must draw the same conclusion from them;" and that the trial Judge should have held as a matter of law that the injury sustained by plaintiff was due to his own fault and negligence, and to that only, and that the risk of injury was voluntarily assumed by him.

The following facts seem to us to be established by uncontradicted testimony :

1. That plaintiff on the day he was injured was traveling over a part of defendant's railway on a "Drovers' Pass," by the terms of which he was required to ride in the "caboose" car while the train was in motion.

2. That a caboose was provided for his use and was placed next to his stock car for his better accommodation.

3. That he did not ride in the caboose at all, but by preference rode in the stock car with his cattle and horses.

4. That he was requested by the conductor and brakeman at different times to ride in the caboose, which was provided for that purpose and was the proper place for him under his contract, but declined to go there, saying he would rather ride with his stock.

5. That he was told by both the conductor and brakeman that the caboose was a safer place for him to be in than was the stock car.

6. That he would not have been injured if he had been in the caboose instead of in the stock car.

7. That the accident did not occur at a station or at a place where he could reasonably expect the train to stop for any purpose ; and

8. That he fully knew the dangers attending his presence in the stock car, and voluntarily assumed the risk resulting therefrom.

Upon these facts, which we insist are not controverted, it was clearly the duty of the trial Judge to instruct the jury to render a verdict for the defendant, and, in support of this contention, we call the attention of the Court to its own decisions in cases where the facts were, to all intents and purposes, on all fours with those in the case at bar.

CASES ON ALL FOURS WITH THE CASE AT BAR.

In *St. Louis, &c., Railway vs. Schumacher*, 152 U. S., 77 (1894), Mr. Justice BROWN rendered the opinion of the Court. It is as follows :

" The testimony showed that plaintiff was employed as a common laborer by defendant ; that it was his duty to assist in loading cars with gravel and then ride down on the train to that portion of the track where the gravel was to be used, and there to assist in unloading and placing the gravel between the ties. At the time of his injury plaintiff was sitting on the end of a loaded flat car next to the caboose, with his feet hanging over the side of the car. The train had stopped at Talihina, a station between the gravel pit and its destination, to take up ten additional carloads of gravel, which were standing upon a side track, the original train consisting of four cars and a caboose. On arriving at Talihina, the engine left the cars and caboose on the main track, went in on the siding, coupled on thirteen cars that were standing on the side track, three of which next the engine were not wanted. When the engine and thirteen cars got on to the main track, the ten cars that were wanted were cut loose from the engine and allowed to go down the grade. The grade proved to be a little steeper than the brakeman in charge of the cars supposed, and, to use his own words, ' The cars got the start of me a little, and when I saw they were going to hit a little too hard, I halloaed to the men " look out." I saw they were going to hit harder than I thought, harder than cars ought to strike in making a coupling.' They came in contact with that portion of the train on which plaintiff sat with a violent jar or shock, which caused him to lose his balance, fall with his feet upon the track, when the wheels passed over a portion of his right foot, necessitating amputation.

"The testimony showed that the train was manned by the usual complement of trainmen—namely, a conductor, two brakemen, an engineer and a fireman—and that each was competent. At the time of the injury the conductor was near the forward end of the four stationary cars for the purpose of making the coupling. The engineer and fireman were in their proper positions upon the engine. One brakeman was with the engine and three cars, which were being replaced on the sidetrack, and the other was on the ten cars which were to be attached to the train. There was no evidence of any defect in the brakes, machinery or appliances, or any failure to make or enforce suitable regulations, and these issues were not submitted to the jury. There was evidence tending to show that the place where the plaintiff sat when he fell was a dangerous place to be in when cars were being coupled, and plaintiff testified that he knew that they were about to couple some cars, but was not watching and did not see the other cars come down. There was evidence tending to show that both the brakemen and the foreman shouted to the men on the flatcars to look out, and that they were distinctly heard by persons in a less favorable place to hear than the plaintiff. There was also evidence tending to show that the men had been warned by their foreman and by the trainmaster not to ride on the flatcars, but to ride in the caboose, and that the conductor had told the same gang of laborers of that morning that they had better ride in the caboose, and that there was plenty of room there. There was also testimony that the men often rode on the flatcars with the knowledge of the foreman and conductor.

"The gist of all this testimony is that, notwithstanding the foreman and the train master had warned the men not to ride on the flat cars, and had provided a caboose in which he was told it was safer to ride, plaintiff selected a place he knew to be dangerous when cars were being coupled; sat with his legs hanging over the side of the car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he. Under such circumstances, he has no right to call upon the company to pay him damages. Had he been riding in

the caboose, he would have been safe. Had he taken the precaution to notice what was going on, he could not have failed to see that a collision was imminent, and could have jumped off. The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury. Neither was there any evidence of a wilful or intentional negligence on the part of the defendant for the purpose of injuring the plaintiff. None such was averred in the complaint, and none such was shown in the testimony. The case of Railroad Co. vs. Jones, 95 U. S., 439, is directly in point, and is decisive of this. See, also, St. Louis and San Francisco Railway vs. Marker, 41 Arkansas, 542; Glover vs. Scotten, 82 Michigan, 369."

In *Railway Company vs. Jones*, 95 U S., 439 (referred to, followed and applied by this Court in the case last cited), the facts as shown by the record were these: Plaintiff was engaged as a laborer in constructing and keeping in repair the roadway of the railway company. The company usually conveyed the laborers to and from their work, sometimes in a car, and sometimes with only an engine and tender. It was a common thing for some of them to ride on the pilot or bumper in front of the engine, in either case, and this was done with the approval of the conductor. On the day plaintiff was injured the train consisted of an engine, tender and box-car. Plaintiff was told by the conductor to jump on anywhere, as they were in a hurry. Plaintiff rode on the pilot; there was a collision in a tunnel and he was injured—only plaintiff and another man on the pilot being hurt. It also appeared that the box-car had been used on the train six weeks or more,

and that the conductor when it was first used, and on several later occasions, had notified the laborers they must ride in the car and not on the engine; that plaintiff had been forbidden to ride on the pilot, and that he was there on this occasion without the knowledge of defendant's agent. There was room for him in the car, and if he had been there he would not have been hurt.

Mr. Justice SWAYNE, on behalf of the Court, said (p. 442):

"One who, by his negligence, has brought an injury upon himself, cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: (1) Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened."

* * * * * *

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little if not less time than it took to climb to the pilot. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. With-

out the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down (Hickey vs. Boston & Lowell Railroad Co., 14 Allen (Mass.), 429; Todd vs. Old Colony R. R. Co., 3 *Id.*, 18; s. c., 7 *Id.*, 207; Gavett vs. M. & L. R. R. Co., 16 Gray (Mass.), 501; Lucas vs. N. B. & T. R. R. Co., 6 *Id.*, 64; Ward vs. Railroad Company, 2 Abb. (N. Y.), Pr., n. s., 411; Galena & Chicago Union R. R. Co. vs. Yarwood, 15 Ill., 468; Doggett vs. Illinois Central R. R. Co., 34 Iowa, 284."

This decision was followed by the Circuit Court for the District of Minnesota in *Kresamorski vs. Northern Pac. R. Co.*, 17 Fed. Rep., 229.

See, also,

Pennsylvania R. Co. vs. Langdon, 99 Pa. St., 21, 27.

Houston, &c. R. Co. vs. Clemmens, 55 Tex., 89.

Kentucky Central R. Co. vs. Thomas, 79 Ky., 160.

Railway Co. vs. Lane, 83 Ill., 478.

Railway Co. vs. Watson, 93 Ky., 654.

Railway Co. vs. Sweep, 57 Ark., 287.

The request of defendant that the Court instruct the jury to render a verdict in its favor should have been granted.

II.

If the trial Court did not err in refusing to direct a verdict for the defendant on the evidence, its refusal to submit to the jury the evidence as to the defenses of contributory negligence and assumed risk was clearly error.

When the evidence was all in and the case ready for the jury the Court charged as follows (Tr., p. 25):

"My view of this case, gentleman, is not in accordance with the position assumed by the attorneys, either for plaintiff or the defendant in this case, and I charge you that there is but one theory of the law of this case by which the plaintiff can recover, and that is as follows:

"If you believe from the evidence that the plaintiff Alexander Reeder was riding in the stock car in which his horses and cattle and goods were being transported over the defendant's road, and that while the train was *stationary*, his cattle being down, and needed his attention, he, at the time, in a prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed."

Defendant excepted to this charge as appears in the third assignment of error.

It is always dangerous for a court to strike out new paths not seen by counsel on either side, and this case is no exception to the rule.

The Court also charged (Tr., pp. 25, 26):

"If, however, you believe from the evidence that at the time the plaintiff was hurt that the train upon

which he was riding was in motion at the time he was giving the horses and cattle the assistance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant."

~~Exception to this charge was taken immediately, as is shown by the fourth assignment of error.~~

Defendant then asked the Court to give the charges contained in the fifth and sixth assignments of error--the fifth requesting the Court to charge on the defense of assumed risk and the sixth on the defense of contributory negligence. Both of those requests were refused and exceptions saved.

The Court will notice that the trial Judge did not construe the contract under the conditions of which plaintiff was traveling, as to the phrase, "while the same [the train] is in motion," and that it did not in terms or in any fair manner direct the jury to make its own construction of that phrase.

In the first part of the charge, quoted above, the Court practically and in effect told the jury to find for the plaintiff if they found that the train was "*stationary*" when the accident occurred; and, in the second part of the charge, also quoted above, it instructed them in so many words that if they found the train was *in motion* at the time they should find for defendant.

If this was intended by the Court to be a statement of the meaning of the contract, it is, as we submit with due respect to the trial Judge, totally erroneous. It is not possible that the plaintiff could have sustained the injury complained of if the train was "*stationary*." Here is where the Court's newly discovered "view" led the Court into a region of fog and quagmires. There must have been *some motion* to have

caused the injury. Plaintiff certainly thought there was motion in the train at the time, and so testified. The jury certainly ignored all the evidence when it found that the train was *stationary* at the time, as is involved in their verdict. The case was submitted to the jury on a hypothesis which had no foundation in fact. The train was not "stationary" in fact. On the contrary, it was "in motion" both in fact and within the meaning of the special contract between the plaintiff and the railroad company. By that contract on the admitted and undisputed facts, the company was not liable, and the Court's "view" of the case was entirely misconceived.

The instruction or charge of the Court under review was, as we submit, wholly erroneous, for the reason that a reasonable interpretation of the contract would require the holder of it to remain in the caboose except when the train was *at stations*, or, at the utmost, when it was at other places where, under all the circumstances, the passenger *had reason to believe that it would not resume its journey* for a time sufficient for him to care for his stock.

If this interpretation is correct, as we believe it is, and plaintiff had traveled in the caboose at all, and gone into the stock car at any point between stations, the question whether, in doing so, he had assumed the risk contemplated in the contract or had been guilty of contributory negligence, would properly have been submitted to the jury. But here plaintiff had violated the terms of his contract from the very beginning of his journey, and, as his own testimony shows, voluntarily remained in a place where he had no right to be, and in spite of earlier experiences which had vividly brought to his knowledge the danger attending his presence

there. He preferred, as he said, to ride in the stock car to look after his stock even after he had been requested to go into the caboose and told that it was a safer place for him.

That he knew his presence in the stock car was dangerous to himself is proved by his own testimony. He said (Tr., p. 11) that after leaving Texarkana the stock had been repeatedly thrown down ; that on two or three of these occasions he had asked the brakeman to request the engineer to use more care ; that he was afraid to get in where the horses and cattle were in any other way than by climbing into the feed trough ; that he knew he was in danger of being killed; and, notwithstanding all these experiences, he persisted in remaining in the stock car, persisted in staying there after he had been requested to go into the caboose provided for his use and which his contract contemplated he would use at such a time, and after he had been told it was a safer place for him. According to his own testimony, immediately before the accident his cattle had been thrown down, he had raised them to their feet, had resumed his place of fancied security on the feed trough, and was awaiting the catastrophe which resulted so unfortunately for him.

However much we may sympathize with plaintiff in his misfortune, and applaud his desire to protect his animals from injury, assuming that in doing so he was actuated by kindly motives and not by mere self interest, the fact remains that as between him and the railway company in this action he was guilty of contributory negligence in being in the stock car under the circumstances described by him in his testimony.

Even if the trial Court was right in refusing to direct a verdict for defendant (which we believe to be error

as we have claimed), there certainly was sufficient evidence of contributory negligence on the part of plaintiff, and of his having assumed the risk of injury by his conduct, to require the Court to submit those questions—and they comprised all the defenses of the railway company—to the jury. This was not done. The attention of the jury was directed to the evidence of negligence of the defendant when the train was stationary, but not a word was said to them as to the contributory negligence of the plaintiff nor as to his having assumed the risk under his contract for transportation, and these were the issues in the case as fully and completely as was the negligence of the defendant.

By way of recapitulation. The charge to the jury completely ignored the facts and circumstances connected with plaintiff's cattle being down and needing attention, and the further fact that plaintiff was aware that the train had not stopped at any station. He testifies himself that the engineer had cut part of the train loose and pulled it up the hill, and then backed his engine against the remaining part to pull it up the hill, and that it was the jerk it received when the engineer started, and when he coupled on, that caused his injury. It completely took away from the jury the question of fact whether or not Reeder was guilty of negligence in attempting to administer to his cattle under the peculiar circumstances existing at the time and which caused the train to be stationary. It further took away from the jury the consideration of the fact that Reeder was in a trough at the time he was hurt, and that his reason for being there was that he was afraid he would be trampled upon by the cattle. It

took away this fact from their consideration as a circumstance showing that Reeder knew that the car was likely to be moved at any moment. The charge further failed to permit the jury to take into consideration the *failure of plaintiff to allege that the train was stationary* at the time he attempted to assist his cattle, and that the defendant or its servants knew, or, by the exercise of ordinary care, could have known, that he was engaged in administering to his cattle at the time the engine came back for the remainder of the train.

The record discloses that the defendant pleaded and relied upon both the defenses of contributory negligence and assumed risk. The evidence shows that plaintiff was fully advised it was more dangerous to ride in the stock car with his cattle than in the caboose, and that if he had been in the caboose *he would not have been hurt;* that plaintiff considered his stock in danger of being killed on account of the jerking and jolting, and with full knowledge of this fact he put himself in peril for the purpose of protecting his stock. By the record it appears, as above stated, not only that the defenses of contributory negligence and assumed risk were properly pleaded, but that there was ample testimony to support them. Yet, in view of all these facts, the Court expressly refused to charge the jury, or to submit to the jury any charge whatever, either upon contributory negligence or assumed risk. The only issue submitted to the jury by the Court's charges is that if plaintiff, in a prudent and careful manner, attempted to give the horses and cattle needed assistance while the car was *stationary*, then the defendant was liable. We submit that the prudent or careful manner in which plaintiff administered to his cattle had nothing to do with the ques-

tion of his recovery or of defendant's liability. It was his negligence *in the selection of the time in which to administer to the wants of his cattle* which was in issue, and that question the jury should have been allowed and required to consider. It made no difference to the defendant whether he administered to his cattle in a careful manner or in a prudent manner or not, but the question of his negligence turns upon the fact as to whether or not he selected *a proper time* in which to perform this work, and that was a question to be submitted to the jury under the facts and a proper charge under the plea of contributory negligence. We insist that there was ample evidence to support the defenses of contributory negligence and assumed risk, and that these issues should have been submitted to the jury.

Under the rule as stated by this Court in the cases cited under the first point of this brief the trial Court had but two alternatives in charging the jury in this case. Either the jury should have been instructed, as we insist should have been done upon the evidence, to find a verdict for defendant, or the questions relating to contributory negligence and assumed risk should have been submitted to them.

As that Court failed and refused to do either, the judgment below must be reversed and a new trial ordered.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

APPENDIX.

The opinion of the Circuit Court of Appeals in this case not being in the printed transcript of record we reproduce it here, as we find it reported in 76 Fed. Rep., 550, 553:

CIRCUIT COURT OF APPEALS,

FIFTH CIRCUIT (AUGUST 4, 1896).

TEXAS & PACIFIC RY. CO.,

vs.

ALEXANDER REEDER.

Before MCCORMACK, Circuit Judge, and SPEER and PARLANGE, District Judges.

[NOTE.—Assignment of error No. 1, referred to in this opinion, was that the trial Court erred in admitting the deposition of plaintiff to be read when he was present in Court.]

"PARLANCE, District Judge (after stating the case as above). I take it to be clear that plaintiff in error has abandoned the assignment of error No. 1. The language of the brief for plaintiff in error (page 3) can have no other meaning. (See American Fiber Chamois Co. vs. Buckskin Fiber Co., 18 C. C. A. 662, 72 Fed., 508.)

"Assignment of error No. 2, which addresses itself to the refusal of the trial Judge to direct a verdict in favor of the railway company, is without force. The reason given for asking a peremptory instruction shows that the request was based upon the erroneous theory that Reeder was bound to remain constantly in the

caboose without regard to the fact whether the train was in motion or not. It is, of course, evident that if Reeder had ridden in the caboose during the whole trip the particular accident which befell him would not have happened; but, under the contract, he had the right to care for his stock, and the only restriction which the company placed upon his actions in that respect was that he should not attend to the stock while the train was in motion. This case was clearly not one in which it would have been proper for the trial Judge to have directed a verdict. There was a conflict of evidence, and sufficient testimony if believed by the jury to sustain a verdict in favor of Reeder. The credibility of witnesses is matter for the jury.

"All the other assignments of error are, in the same manner as assignment of error No. 2, open to the fatal objection that they assume that Reeder had no right to leave the caboose; whereas, if the car was stationary and his cattle needed attention and he proceeded to care for them in a prudent manner, and he was then injured by the fault of the railway company, there is nothing in the law or in the contract to prevent him from recovering.

"The charge of the trial Judge stated the issues and the law fairly and clearly. The question of fact was left to the jury as it should have been. There is no error in the case, and for the foregoing reasons I concur in the judgment of the Court affirming the judgment of the lower court."